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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS ENRIQUE PENA,

Defendant and Appellant.

B218406

(Los Angeles County
Super. Ct. No. VA108005)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Philip H. Hickok, Judge. Affirmed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Luis Enrique Pena was charged with two counts of lewd and lascivious conduct under Penal Code section 288, subdivision (b). A jury convicted him of both counts. Appellant appeals, arguing that there was insufficient evidence to establish the element of force and/or fear and the element of lewd intent as set forth under CALCRIM No. 1111. We affirm the conviction.

STATEMENT OF FACTS

E. M. was 16 years old and her sister, Crystal, was 12 years old in 2008. E.M. had previously met appellant at a Fourth of July block party when she was 14. Appellant told E.M. that he was 17. She gave him her phone number and he called her later that night. Soon afterward, E.M.'s mother discovered that appellant was 18 years old and told appellant that he should not call again. E.M.'s mother changed her phone number shortly after that.

Appellant continued his attempts to contact E.M. in public. He whistled at her, requested her new phone number, and sometimes asked for a hug as E.M. walked home from school. E.M. did not want appellant's attention.

Crystal knew of E.M.'s problem with appellant. She also knew that he never attempted to touch E.M. and only asked for hugs. In October of 2008, she was walking home from school when she saw appellant pacing back and forth on her street. Crystal did not want to talk to him because she was afraid of him. The two exchanged greetings. Appellant asked Crystal if E.M. would be coming out more often during the summer, and she said no. He then asked Crystal for her age and whether she had a boyfriend. Crystal lied, telling him that she had a boyfriend. Appellant asked to "hook up" with E.M., but Crystal replied that her sister did not want to do so.

Appellant said to Crystal "Let me be your boyfriend," and told her not to think that he would hurt her. Appellant grabbed Crystal by her left wrist and pulled her hand toward the front zipper of his pants, near his genital area. Crystal pulled her hand away before her hand touched appellant's crotch. Appellant then asked for a hug and a kiss, which made Crystal feel scared. She did not want to hug or kiss him but eventually agreed to give him a hug because she felt bored and wanted to get appellant out of the

way and go home. The front of his body came into contact with the front of her body. Appellant held Crystal for approximately 30 seconds, while she struggled continuously to break his grasp. During the hug, Crystal felt appellant's erect, but clothed, penis press against her thighs. Crystal broke from his grasp and appellant told her not to tell anyone about the incident.

After returning home, Crystal waited approximately 10 minutes for E.M. to arrive, then told her about the incident. She told her sister that appellant forced her to hug him and that he grabbed her hand to put on his genitals. Crystal also reported this incident to their mother, who called the police. Deputy Sheriff Robert Bankston arrived about 25 minutes later to speak to Crystal. Crystal told him that, during her hug with appellant, she felt his erect penis and it was getting bigger.

Detective Steve French interviewed Crystal in October 2008 while Crystal was at school. Crystal gave the same account, complaining that appellant pulled her hand toward his crotch, held her in hug against her will, and rubbed his erect penis against her body.

Detective French also interviewed appellant in October 2008. Appellant denied having an erection when he hugged Crystal and pulled her hand towards his penis. He acknowledged that he should not have given Crystal a hug and that the hug scared Crystal even more.

Appellant was charged with 2 counts of forcible lewd acts upon a child under the age of 14 in violation of Penal Code section 288, subdivision (b)(1). The first count was charged against appellant for grabbing Crystal's hand towards his genital area. The second count was for appellant's hugging Crystal while having an erection. A jury found appellant guilty of both counts.

DISCUSSION

I. Standard of Review

The determination of the truth or falsity of facts and of the credibility of witnesses is the exclusive province of the jury or the trial judge. (*People v. Ochoa*, (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.) On appeal, the court

reviews the record in the light most favorable to the judgment. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Rayford* (1994) 9 Cal.4th 1, 23.) The reviewing court defers to the trier of fact when the verdict is supported by substantial evidence. (*People v. Ochoa, supra*, 6 Cal.4th at p. 1206.) This is consistent with the federal standard, which holds that “*all of the evidence* is to be considered in the light most favorable to the prosecution” when a defendant has been found guilty of the crime charged. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Reversal for insufficiency of the evidence is only warranted when it appears ““that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].”” (*People v. Hughes* (2002) 27 Cal.4th 287, 370; *People v. Bolin* (1998) 18 Cal.4th 297, 331.)

II. Legal Standard

To prove that the defendant is guilty of violating Penal Code section 288, subdivision (b)(1), “the People must prove that: 1. The defendant willfully touched any part of a child’s body either on the bare skin or through the clothing; [or] The defendant willfully caused a child to touch her own body, the defendant’s body, or the body of someone else, either on the bare skin or through the clothing; 2. In committing the act, the defendant used force, violence, duress, menace or fear of immediate and unlawful bodily injury to the child or someone else; 3. The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of himself or the child; AND 4. The child was under the age of 14 years at the time of the act.” (CALCRIM No. 1111.) “Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend[ed] to break the law, hurt someone else, or gain any advantage. [¶] Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or the child is not required. [¶] The *force* used must be substantially different from or substantially greater than the force needed to accomplish the act itself. [¶] An act is accomplished by *fear* if the child is actually and reasonably afraid or she is actually but unreasonably afraid and the defendant knows of her fear and takes advantage of it. [¶] It is not a defense that the child may have consented to the act.” (CALCRIM No. 1111.)

Here, appellant argues that the state did not meet its burden of proving the “force” or “fear” requirement and the “lewd intent” requirement of Penal Code section 288, subdivision (b) beyond a reasonable doubt for both count 1 and count 2 of the information.

A. Force and Fear

In order to establish the element of “force” in Penal Code section 288, subdivision (b), the prosecution must “prove that the defendant used physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself.” (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474.) This standard has been reaffirmed in subsequent cases. (See *People v. Neel* (1993) 19 Cal.App.4th 1784, 1787-1788.) In *People v. Babcock* (1993) 14 Cal.App.4th 383, 385, 387, the court held that the defendant’s conduct constituted “force” when the victim pulled back her hand after the defendant had grabbed it to touch his crotch. The court also held that the question of whether the defendant used “force” to accomplish the lewd act in question was properly left to the jury. (*Id.* at p. 388.)

There are cases in the minority that hold that evidence of force was insufficient under Penal Code section 288, subdivision (b). In *People v. Schulz* (1992) 2 Cal.App.4th 999, 1004, the court reasoned that because “ordinary lewd touching often involves some additional physical contact, a modicum of holding and even restraining cannot be regarded as substantially different or excessive ‘force.’” Similarly, the Sixth Appellate District held in *People v. Senior* (1992) 3 Cal.App.4th 765, 774, that “[s]ince ordinary oral copulation and digital penetration almost always involve some physical contact other than genital, a modicum of holding and even restraining cannot be regarded as substantially different or excessive ‘force.’”

However, *Senior* and *Schulz* have been criticized. In *People v. Bolander* (1994) 23 Cal.App.4th 155, 159-161, the Sixth Appellate District recognized and repudiated its decisions in *Senior* and *Schulz*, holding that “defendant’s acts of overcoming the victim’s resistance to having his pants pulled down, bending the victim over, and pulling the victim’s waist towards him constitute force within the meaning of subdivision (b)”

because the defendant used force to carry out the lewd act without the consent of the victim. The court further noted that the analysis of “force” in *Senior* and *Schulz* was dicta. (*People v. Bolander, supra*, 23 Cal.App.4th at p. 161.) The Fourth Appellate District recently upheld the holdings in *Bolander*, *Neel* and *Babcock* when it held that “[force] includes acts of grabbing, holding and restraining that occur in conjunction with the lewd acts themselves” (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1005.)

Here, the evidence shows that appellant used force substantially different from or substantially greater than that required to accomplish the lewd acts. Appellant grabbed Crystal’s wrist and pulled it towards his crotch. Crystal pulled her hand away before it touched appellant’s crotch. This circumstance is not materially different than the facts in *Babcock*, where the defendant was properly convicted of using force when he grabbed two victims’ hands and forced them to touch his genitals. (*People v. Babcock, supra*, 14 Cal.App.4th at 385-387.) Appellant, having an erection, also hugged Crystal for 30 seconds while she continuously struggled to break from appellant’s grasp. Appellant’s holding of Crystal against her will clearly satisfies the “force” requirement as defined by Penal Code section 288, subdivision (b) and is substantially different from and substantially greater than that necessary to accomplish the lewd act itself. (*People v. Cicero, supra*, 157 Cal.App.3d at p. 474.) The determination of whether appellant used force as charged in count 1 and count 2 was properly left for the jury to decide, and a finding of force was supported by substantial evidence. (*People v. Babcock, supra*, 14 Cal.App.4th at p. 388.)

Alternatively, the evidence supports a finding that appellant committed both lewd acts by use of fear. “Fear” is defined as ““(1) “A feeling of alarm or disquiet caused by the expectation of danger, pain, disaster, or the like; terror; dread; apprehension” [citation] and (2) “Extreme reverence or awe, as toward a supreme power” [citation].”” (*People v. Cardenas* (1994) 21 Cal.App.4th 927, 939-940, quoting *People v. Montero* (1986) 185 Cal.App.3d 415, 425.) “An act is accomplished by fear if the child is actually and reasonably afraid or she is actually but unreasonably afraid and the defendant knows

of her fear and takes advantage of it.” (CALCRIM No. 1111; see also *People v. Cardenas*, *supra*, 21 Cal.App.4th at p. 940.)

Here, Crystal was in fear under section 288, subdivision (b). She knew of her sister’s problems with appellant. Crystal did not want to talk to him because she was afraid of him. Appellant told Crystal ““Let me be your boyfriend,”” and not to think that he would hurt her. Appellant also told Crystal not to tell anyone about the incident after she had broken from his hug. Appellant further acknowledged that he should not have given Crystal a hug and that the hug scared Crystal even more. Crystal clearly experienced a feeling of “alarm,” “dread,” and “apprehension” (*People v. Cardenas*, *supra*, 21 Cal.App.4th at pp. 939-940) when appellant grabbed her hand and also when appellant hugged her. Her feelings were reasonable given her knowledge of appellant’s prior conduct with her sister. She may have feared immediate bodily injury in light of her young age relative to appellant’s age. Furthermore, appellant’s attempt to mollify Crystal when he approached her and his admission that his hug scared Crystal show that appellant was cognizant of Crystal’s fear and took advantage of her fear when he grabbed her wrist and when he hugged her for 30 seconds.

The evidence supports the finding that appellant used force or fear when he grabbed Crystal’s wrist and pulled it toward his genital area and when he hugged Crystal against her will for an extended period of time. It cannot be said that under no hypothesis whatever is there sufficient substantial evidence to support the conviction. (*People v. Hughes*, *supra*, 27 Cal.4th at p. 370.)

B. Lewd Intent

Penal Code section 288 “prohibits *all* forms of sexually motivated contact with an underage child. Indeed, the ‘gist’ of the offense has always been the defendant’s intent to sexually exploit a child, not the nature of the offending act.” (*People v. Martinez* (1995) 11 Cal.4th 434, 444.) “[T]ouching’ of the victim is required,” but the “form, manner, or nature of the offending act is not otherwise restricted. Conviction under the statute has never depended upon contact with the bare skin or ‘private parts’ of the defendant or the victim.” (*Ibid.*) The trier of fact looks to all circumstances surrounding the offense to

determine the presence of lewd intent and considers such factors as the relationship between the parties, the defendant's extrajudicial statements, and other lewd acts admitted or charged in the case. (*Id.* at p. 445.) “Because intent can seldom be proved by direct evidence, it may be inferred from the circumstances.” (*People v. Mullens* (2004) 119 Cal.App.4th 648, 662, quoting *In re Jerry M.* (1997) 59 Cal.App. 4th 289, 299.)

Here, the totality of circumstances support a finding that appellant's conduct reflected the requisite lewd intent. The jury could have reasonably concluded that appellant possessed the requisite lewd intent when he pulled Crystal's hand near his crotch and when he forcibly hugged her for 30 seconds while having an erection. Appellant initially told Crystal “Let me be your boyfriend,” and he thereafter told her not to tell anyone about the incident after she broke from his grasp. Further indicative of appellant's lewd intent, he admitted to Detective French that he should not have hugged Crystal.

Accordingly, sufficient substantial evidence supports the finding that appellant possessed the requisite lewd intent when he grabbed Crystal's wrist and pulled it toward his genital area and when he hugged Crystal against her will. (See *People v. Hughes*, *supra*, 27 Cal.4th at p. 370)

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.